United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-2058 Original Copy

To be argued by:
David R. Spiegel

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel. ROY SCHUSTER,

Petitioner-Appellant,

-against-

LEON J. VINCENT, Warden,

Respondent-Appellee.

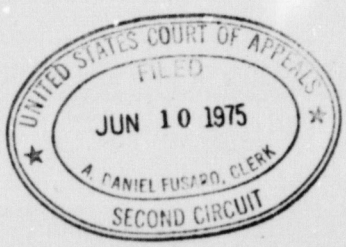
75-2058

BRIEF FOR RESPONDENT-APPELLEE

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent-Appellee
Vincent
Office and P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-7591

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

DAVID R. SPIEGEL
Assistant Attorney General
Of Counsel



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UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA ex rel.
ROY SCHUSTER,

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75-2058

BRIEF FOR RESPONDENT-APPELLEE

Question Presented

Whether, notwithstanding the statutes and regulations governing the New York State Board of Parole, petitioner is entitled to an unconditional, unsupervised release from prison? The lower court held that he was not and dismissed this habeas corpus proceeding.

Statement

This is an appeal by Roy Schuster, a New York State prisoner incarcerated at Green Haven Correctional Facility from a judgment of the United States District Court for the

Southern District of New York (Owen, J.) dated March 25, 1975, denying his application for a writ of habeas corpus. Petitioner asserts that he is entitled to an unconditional release from prison and that any sort of parole arrangement short of this (which is, in fact, what was offered to him) is unacceptable.

A certificate of probable cause was granted by the District Court on April 7, 1975.

Facts

In 1931, Schuster killed both his wife and her attorney. For this, he was found guilty of murder in the second degree and sentenced, pursuant to the judgment of Judge Charles C. Nott, Jr., of the then General Sessions in New York County, to an indeterminate term of twenty years to life imprisonment. He is presently incarcerated at Green Haven Correctional Facility.

Because of the nature of his sentence, petitioner could be released from prison only at such time as the Board of Parole assumed jurisdiction over him and then determined in its discretion to release him. See Correction Law, former § 212 (L. 1932, c. 457; L. 1936, c. 70 § 2); also Correction Law § 212-a, subds. 1, 5, which constitutes part of a 1972 amendment to former § 212. The Parole Board's jurisdiction

applied at the time petitioner had completed his minimum sentence, subject to the earning of good behavior time. See former § 212*; also § 230 of the former Prison Law, as amended by former § 230 of the Correction Law.

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*Former § 212 reads in pertinent part as follows:

> "Every prisoner sentenced to an indeterminate sentence and confined in a state prison, when he has served a period of time equal to the minimum sentence imposed by the court for the crime of which he was convicted, shall be subject to the jurisdiction of the board of parole. The time of his release shall be discretionary with the board of parole, but no such person shall be released until he has served such minimum sentence, nor until he shall have served one year."

Section 212 became effective March 6, 1936. Since petitioner, according to his own allegations, was not eligible for parole until 1948, the section obviously applied to him.

The petitioner commenced his sentence in Sing Sing, which serves as a reception center for newly sentenced prisoners. In 1933 he was transferred to Attica State Prison; in 1935, he was again transferred this time to Clinton Correctional Facility. In 1941, petitioner was found insane after a psychiatric examination and sent to Dannemora State Hospital. In this regard, it is to be noted that petitioner has contended throughout this proceeding that his confinement at Dannemora was in retaliation for his desire to expose alleged corruption in Clinton while he was a prisoner there.

In 1968, with petitioner still at Dannemora, this court ruled that his transfer from Clinton to Dannemora had not been procedurally correct and ordered the State to either grant a new hearing, in accord with procedural due process, or return him to a prison facility. Schuster v. Herold, 410 F. 2d 1071 (2nd Cir. 1969), cert. den. 396 U.S. 487 (1969). In March, 1972, the petitioner was transferred from the hospital to the Green Haven Correctional Facility in accord with the federal order (18).

In May of 1972, the petitioner was granted a parole release hearing. Regarding any possibility of parole, petitioner stated, "I would not accept parole. Absolutely not. I am 25

years over my parole time.* I would regard even an offer of parole, as a gratuitous insult." (The minutes of petitioner's 1972 meeting with his Parole Board are appended to the Spiegel affidavit in this court below as Exhibit "A"; see p. 1). Subsequently, after patiently listening to Schuster's questions regarding his incarceration at Dannemora, Commissioner Quinn told Schuster:

> "Mr. Schuster, I, as the Chairman of this panel, have to advise you that we do not -- have jurisdiction to discharge you from a sentence legally imposed, except under one circumstance, and that circumstance could possibly be when you are paroled and having -- as you are a first felony offender, do five good years of parole supervision in the street, we could then, upon your application, consider discharging you from your sentence. That's the law" (Exhibit "A", p. 3).

*The rationale behind this statement lies in petitioner's belief that had he not been committed to Dannemora, he would have been eligible for parole release in 1948. The answer to this argument is found infra, pp. 18-19.

Despite this counsel, Schuster remained adamant in his position. This compelled the Board to reserve further consideration of his status until May, 1973.

On May 16, 1973, Schuster again met with the Parole Board. This time, after summarily indicating, "I refuse parole", he left the room. (The meeting of petitioner's 1973 meeting with the Parole Board are appended to the Spiegel Affidavit below as Exhibit "B".)* Schuster's action compelled the Board to once again hold his case for reconsideration -- this time, until May, 1974.

*In the minutes there is reference to a decision of the Dutchess County Supreme Court. This is discussed, infra, at pp. 9-10. At the time of the Parole Board's meeting there was a stay in effect on the decision; on June 18, 1973, approximately one month after the Board's decision, the Appellate Division, Second Department unanimously reversed the lower court (infra, p. 4).

In May, 1974, Schuster met with the Parole Board for the third time since his release from Dannemora (The minutes of the 1974 meeting are appended to the Spiegel Affidavit below as Exhibit "C".). Each of the Parole Board Commissioners present during the lengthy meeting virtually entreated petitioner to consider a supervised release. However Schuster remained adamant in his refusal. His attitude is amply illustrated by an exchange with Commissioner Pierro at the outset of the meeting:

> "Q. Good morning Mr. Schuster, how are you today?
> A. I'm all right.
> Q. Good. Mr. Schuster, since we last talked there are many things that have been happening. We are aware of the court proceedings. The Parole Board is anxious at this time to be of whatever help we possibly can. If you have any trouble hearing me, I will speak louder. All right. The Parole Board would like to be as helpful as they possibly can today. In order for us to be of some help, we need to communicate, right?
> A. Yes, but you want to limit it to parole. I will not accept parole under Parole Board's supervision.
> Q. You have been working in this area regarding parole. What is the objection, the freedom is there and the supervision is a support where parole might be helpful to you. Things have changed out on the street.

Prior Proceedings

A. State Courts

Petitioner's claims have been exhausted in the state courts, as required by 28 U.S.C. § 2254.

Schuster proceeded initially in the Supreme Court, Dutchess County, by petition for a writ of habeas corpus dated May 30, 1972. A hearing was held on July 28, 1972 before Mr. Justice Joseph F. Hawkins (The minutes of the hearing are appended to the Spiegel Affidavit below as Exhibit "D"). Thereafter, in a memorandum opinion dated December 15, 1972, Judge Hawkins concluded that petitioner's case presented an "extraordinary situation" which in his opinion "appear[ed] to compel unencumbered parole." (The opinion of Judge Hawkins is appended to the Spiegel Affidavit below as Exhibit "E"). However, other than an assertion that "it requires neither tremendous legal erudition nor administrative ingenuity to fashion a type of parole conditioned upon a nominal or "constructive supervision" (Exhibit "E", p. 3), Judge Hawkins failed to set forth the statutory or case law basis for his conclusions.

A. Parole will not be helpful to me in my case.
Q. Do you care to share with us your thinking why parole will not be.
A. My legal papers support my argument that it is wrong, it is wrong I am entitled to absolute discharge which my conscience wouldn't permit me to accept less than that."

Each subsequent attempt by the Commissioner to reason with Schuster and explain to him the limitations of his authority was met by recitations of grievances that had allegedly accumulated because of or during petitioner's stay at Dannemora (see, in particular, petitioner's lengthy statement at pp. 2-3 of the Minutes). Petitioner indicated that the only release he would accept was one totally without supervision (Minutes, pp. 4-5). Absent such a release - which the Board had patiently explained and re-explained was beyond its authority - Schuster asserted: "I will die in prison if I have to" (Minutes, p. 5).

Faced with petitioner's unrelenting attitude the Board determined to hold him over "one year or earlier pending his indication he will accept the conditions of parole" (Minutes, p. 5).

On the appeal to the Appellate Division, Second Department, the lower court was unanimously reversed (People ex rel. Schuster v. Vincent 42 A D 2d 596). Noting that it was petitioner's "intransigence" which "prevented the Parole Board from granting him such parole as might lawfully have been allowed him at the parole hearing" (42 A D 2d at 597), the Appellate Court went on to conclude, pertinently:

> "As long as the Parole Board violates no statutory requirement, its discretion is absolute and beyond review in the courts" (citation omitted) (id, at 597).

Subsequently, on February 19, 1974, the New York State Court of Appeals denied Schuster leave to proceed with an appeal on the ground his application was not timely made (33 N Y 2d 1009 [1974]).

B. Federal Court Proceedings

The present proceeding was brought on by service of a petition on April 18, 1974.

On November 22, 1974 a hearing was held in the chambers of Justice Richard Owen. Present at this time were the undersigned, as counsel for the respondent; petitioner; and Irving Sokoloff, as the official representative of the New York State Board of Parole.

Mr. Sokoloff indicated that because of the unusual circumstances of Schuster's case, a special parole release agreement could be worked out which would eliminate or ameliorate many of the conditions normally applicable to a parolee. This would include essentially an extremely limiting reporting and visiting schedule, which would be subject to Schuster's convenience and medical needs, and would be tailored to avoid interfering with his life. The Board would also give full assistance to Schuster in obtaining lodging, medical assistance, and employment or public assistance. It would also promise to fully discharge Schuster in five years if he abided by the conditions of his parole. In addition, if need be, the Board would assist Schuster in settling with relatives outside of New York, if this was amenable to Schuster and the relatives concerned.

Mr. Sokoloff's statements were later incorporated into a letter written by the counsel for the Department of Corrections and transmitted to the court (a copy of the letter is appended to these papers as an Appendix); subsequently, the statements were alluded to by the District Court in its opinion.

Following the conclusion of the hearing, Schuster, in papers dated January 14, 1975, indicated that no sort of conditional release agreement would be satisfactory to him; that, instead, the only relief he would consider satisfactory was an unconditional release from prison.

On March 25, 1975, having reviewed the "sad history concerning this case", the District Court concluded that petitioner's habeas corpus application should in all respects be denied.

Adopting the reasoning of the Appellate Division, Second Department in petitioner's state court proceeding, the District Court noted that it lacked authority to interfere with the Parole Board, where its discretion violated no positive statutory requirement. The court then went on to note tersely what is undoubtedly the underlying reality in this matter:

> "He [petitioner] holds the keys to his cell, but will not use them. There being no basis upon which this court can act, I must dismiss his [Schuster's] petition for habeas corpus."
> (Decision, p. 6)

A certificate of probable cause was granted by Justice Owen on April 7, 1975.

ARGUMENT

THERE IS NO FACTUAL OR STATUTORY BASIS FOR THIS PROCEEDING; ACCORDINGLY, THE LOWER COURT DECISION MUST IN ALL RESPECTS BE AFFIRMED.

A.

Because of the peculiar factual nature of his case, petitioner's claim that he is entitled to an unencumbered

release from prison might at first glance appear to have an aura of validity. However, we respectfully contend that once the claim is divorced from its emotional pitch and tested in light of pertinent recent facts and in light of relevant case law, it becomes clear that it is without merit.

The critical reality in this proceeding is that petitioner's current incarceration is entirely a result of his own doing. As we have already indicated (supra, pp. 3-6), on three separate occasions -- in 1972, in 1973, and again in May, 1974 -- petitioner has been offered and summarily rejected a release on parole by the New York State Board of Parole.* On each occasion petitioner was not even interested in discussing what the terms of his release would be.

Subsequently, at an informal hearing held in the chambers of Justice Richard Owen, Schuster, for the fourth time, rejected any sort of supervised release. The rejection was particularily significant since on this occasion Schuster was specifically told by a parole official that the conditions of his release would be substantially more relaxed than those

*In this regard, as already indicated supra, p. 2, a parole release, pursuant to § 212 of the Correction Law, is petitioner's only method of ending his incarceration.

governing a normal parolee and would, in effect, be tailored to his own needs. Indeed, the conditions would merely be intended to soften the trauma of petitioner's re-entry into a society from which he had been absent for 45 years. This is certainly reasonable and can hardly be deemed a violation of petitioner's due process rights, as is contended in the supplemental brief filed by his appointed appellate attorney (see Applt's Supplemental Brief, pp. 4-5). What is far more unreasonable is the relief petitioner is seeking. If petitioner is simply left to his own resources, he might very well find himself overwhelmed by a society which has changed considerably since he was sent to prison.

Apart from this, it must be emphasized that there is simply no statutory authority or case law for the proposition that the Parole Board grant petitioner an unconditional release.

The Parole Board must operate within the structures of the Correction Law and the Rules and Regulations promulgated pursuant thereto. The admission of a prisoner to parole does not relieve the Board, or its parent, the Division of Parole, of the responsibility of superintending his conduct while he is beyond prison walls. Section 210 of the Correction Law charges "the Division of Parole with the supervising of all prisoners released on parole . . ."

It is the schematic purpose of the law to place the Division of Parole in the role of supervisor and friend to those admitted to parole. The Division of Parole assists former prisoners in securing employment and encourages industrial and labor organizations to open apprenticeship training programs to them, so that their readmission to the general society will be as painless as possible. However, the Division of Parole serves another master as well -- the society at large. In this role, the Division monitors the conduct of those released to see that they do not revert to a life a crime or commit anti-social acts. See, e.g., Morrissey v. Brewer, 408 U.S. 471, 477-488 (1972).

The policy is clearly enunciated in § 213 of the Correction Law which reads in part as follows:

> "Discretionary release on parole shall not be granted merely as a reward for good conduct in efficient performance of the duties assigned in prison, but only if the board of parole is of the opinion that there is a reasonable probability that, if such prisoner is released, he will live and remain at liberty without violating the law, and that his release is not incompatible within the welfare of society. . ."

In order to assist the Board in fulfilling this dual mandate -- societal guardian and monitor of the parolee -- Section 215 of the Correction Law requires a prisoner to be released only under certain terms and conditions, a violation of which may render the parolee liable to re-arrest and re-imprisonment. This section also directs the Board to devise general rules for the governance of parolees. Said rules must be accepted by the prisoner before he is granted parole.

The rules of the Board declare that "parole will not be granted to any individual except upon the distinct understanding that the inmate agrees to the conditions of parole as prescribed by the Board of Parole" (7 N.Y.C.R.R. § 1.12). These conditions are set forth generally in the Department of Corrections regulations governing parole release (7 N.Y.C.R.R. § 1.15), but can be varied to fit the needs of a particular case. This is particularly apt in the instant proceeding where the emphasis is far less on preventing Schuster's relapse into criminal ways and far more on his own individual adjustment to society. Thus the conditions normally involved in a parolee's release would be stretched or varied to the point where they are barely noticeable.

The authority of the Parole Board to set conditions for an inmate's release from prison is well-established by case law. See Morrissey v. Brewer, 408 U.S. 471, 477-478 (1972); Berrigan v. Sigler, 499 F. 2d 514, 522 (D.C. Cir. 1974); U.S. v. Marshall, 485 F. 2d 1062 (D.C. Cir. 1973); Clifford v. Beto, 464 F. 2d 1191, 1195 (5th Cir. 1972); Menechino v. Warden, 430 F. 2d 403 (2d Cir. 1970). As the Supreme Court noted in the Morrissey case (id. at 477):

> "The essence of parole is release from prison before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of sentence."

To hold otherwise would frustrate the objective of the parole system which is to restore the prisoner to a useful civilian life as soon as it is the Board's judgment that the transition can be made safely. See, Morrissey, at 478.

The demands by petitioner for total release from supervision cannot be granted by the Board in light of the foregoing statutes and rules. However, as we have already indicated, supra, pp. 2-3, release upon parole is within the grasp of the petitioner-respondent if he would accept what the Board is permitted to offer him at present -- supervised

parole which in time may lead to absolute freedom in the manner detailed in Section 212(8) of the Correction Law which reads in part as follows:

> "If the board of parole is satisfied that an absolute discharge from parole . . . is in the best interest of society, the board may grant such discharge prior to the expiration of the full maximum term to any indeterminate sentence parolee who has been on unrevoked parole for at least five consecutive years. . ."

A discharge granted under this section would constitute a termination of the sentence with respect to which it was granted. The clear language of this section dramatically establishes that the petitioner is currently not eligible for total discharge from the custody of the Division of Parole.

B.

In his pro se appellate brief petitioner argues in essence that he was improperly confined at Dannemora from 1941-1972 and that he had not been so confined, he would have been eligible for parole in 1948. Petitioner concludes that the Parole Board's failure to grant him release at this time deprived it of any subsequent jurisdiction over him (Applt's Brief, 29-42, and in particular, 29-31; see also decision of court below at p. 4).

The obvious answer to this argument is that it contains a totally unwarranted assumption -- namely that on his earliest possible parole release date, Schuster was automatically entitled to release. In fact, contrary to Schuster's assumption, release on parole is and has always been within the discretion of the parole board. See former § 212 of the Correction Law (L. 1932, c. 457; L. 1936, c. 70 § 2); § 212-a, sub. 5 of the Correction Law. If the parole board failed to exercise its discretion in 1948, this certainly did not deprive it of jurisdiction; indeed, the board very probably failed to act because of an assumption that a state prisoner confined at Dannemora would make a poor parole risk. The fact that there is now a possible basis for challenging this assumption is irrelevant; in 1948 and up to the outcome of Schuster's prior habeas proceeding in this circuit, six years ago, the assumption was undoubtedly the most reasonable one for the board to make.

CONCLUSION

THE DECISION OF THE LOWER COURT
SHOULD IN ALL RESPECTS BE AFFIRMED.

Dated: New York, New York
June 3, 1975

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent-Appellee
Vincent

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

DAVID R. SPIEGEL
Assistant Attorney General
Of Counsel

APPENDIX

FORM 1013

STATE OF NEW YORK

DEPARTMENT OF CORRECTIONAL SERVICES

January 27, 1975

Mr. Roy Schuster
GH No. 17722
Green Haven Correctional Facility
Stormville, New York 12582

Dear Mr. Schuster:

RE: U.S. ex rel. Roy Schuster
v. Leon J. Vincent

The Office of the Attorney General has forwarded to this Department a copy of your recent communication to the court.

While this Department, of course, has no authority to comply with your requests and is, therefore, unable to do so, you should be aware that it is not the policy of the Department to harass parolees but rather to assist them in any way possible.

If you are paroled, you and your parole officer would work out a very limited reporting and/or visitation schedule which would be mutually convenient. This schedule might subsequently be reduced to rather infrequent contacts. In addition, your parole officer will assist you in obtaining employment or public assistance as well as medical services or any other social services which you may require. Such assistance would include the establishment of a residence within this State or outside of New York with relatives or others who could provide you with a home if you were interested in such a residence.

In addition, pursuant to Correction Law § 220, Subdivision 2 (since you are a "old law" case), you would be eligible for discharge from parole after you have been on unrevoked parole for at least five consecutive years. It would thus appear to be to your advantage to commence parole as soon as possible.

In the event you have any other questions, please feel free to communicate with us.

Very truly yours,

Victor Zuckerman
First Assistant Counsel

VZ:tw

cc: Hon. David Spiegel

bcc: Michael Falk, SPO

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

SUSAN D. CHIECO , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Respondent-Appellee herein. On the 3rd day of June , 1975 , she served the annexed upon the following named persons:

ROY SCHUSTER
17722
c/o Green Haven
Correctional Facility
Drawer B
Stormville, N.Y. 12582

LEGAL AID SOCIETY
Federal Defender Services Unit
U.S. Court House
Room 509
Foley Square
New York, New York 10007

Petitioner and Attorney in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney & Petitioner at the address es within the State designated by them for that purpose.

Susan D. Chieco

Sworn to before me this
6th day of June , 1975

Assistant Attorney General
of the State of New York